

# PUBLIC SUBMISSION

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## Submitter Information

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## General Comment

September 22, 2015

United States Department of Labor  
Employee Benefits Security Administration  
Office of Regulations and Interpretations  
Attn: Conflict of Interest Rule  
Washington, D.C.  
[www.regulations.gov](http://www.regulations.gov)

RE: Proposed Conflict of Interest Rule and Related Proposals, RIN 1210-AB32 and ZRIN: 1210-ZA25

Good Morning, Ladies and Gentlemen:

I appreciate the opportunity to comment on the United States Department of Labor's ("Department") Employee Benefits Security Administration's ("EBSA") proposed regulation(s) ("Proposal") under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") that will redefine the term "fiduciary" under Section 3(21) of ERISA and Section 4975(e) of the Internal Revenue Code of 1986, as amended.

### I. INTRODUCTION

As an initial matter, I respectfully adopt the comments offered by the Small Business Administration's ("SBA") Office of Advocacy ("Advocacy") on July 17, 2015 (Available at: <http://www.dol.gov/ebsa/pdf/1210-AB32-2-00403.pdf>) (Last Visited on September 15, 2015), and wholly incorporate and integrate the same herein by reference thereto. Specifically, I share the concerns advanced by the SBA's Advocacy's Acting General Counsel, Ms. Claudia Rodgers, that the Proposal evinces a departure

from the essential, threshold requirements of clearly-established law, namely, the Regulatory Flexibility Act, 5 U.S.C. Section 601, et seq. ("RFA"), because the Department's Initial Regulatory Flexibility Analysis ("IRFA") contained in the same is deficient. *Id.* at pp. 1-5. Accordingly, I concur with Advocacy's recommendation that the Department republish for public comment a Supplemental IRFA before proceeding with its Proposal.

Furthermore, I request the Department conduct another round of live hearings on a Supplemental IRFA so that it may proceed on the basis of a fully-developed rulemaking record.

## II. DISCUSSION

Even if the Department has a legal basis upon which it can lawfully proceed with its Proposal without a Supplemental IRFA, the Proposal is additionally flawed because of the following reasons:

First, the Department's proposed broad definition of the term "fiduciary" would certainly operate to diminish the ability of retail brokerage firms like Charles Schwab, Fidelity, and TD Ameritrade to provide free or low cost investment data, tools, research, education and support services to retail retirement investors ("IRA Investor(s)"). See, Wyman, Oliver, "The Role of Financial Advisors in the U.S. Retirement Market," dated July 10, 2015 (Available at: <http://fsroundtable.org/wp-content/uploads/2015/07/The-role-of-financial-advisors-in-the-US-retirement-market-Oliver-Wyman.pdf>) (Last Visited on September 15, 2015); and

Secondly, the Department's proposed limited list of permitted assets which, notably, excludes exchange-listed call and put options, amounts to no more than a solution searching for a problem, and is, thus, very harmful to IRA investors, including, by way of specific example, but not necessarily limited to, those retirees who rely on premiums earned from selling call options fully secured by stock ownership to supplement their income. See, the comments offered by Ms. Ellen L. S. Koplow, Executive Vice President and General Counsel, TD Ameritrade Holding Corporation dated July 21, 2015 (Available at: <http://www.dol.gov/ebsa/pdf/1210-AB32-2-00743.pdf>) (Last Visited on September 15, 2015).

## III. CONCLUSION

The Department's Proposal is flawed. Thus, it should be amended.

## IV. RECOMMENDATIONS

For the reasons set forth above, I recommend the Department take the following action:

First, I respectfully renew my request that the Department prepare a Supplemental IRFA and conduct hearings thereon before proceeding with its Proposal.

Secondly, assuming that the Department proceeds with its current Proposal with or without a Supplemental IRFA, it should substantially narrow its proposed definition of the term "fiduciary," in a manner that is reasonably-calculated to uphold, preserve and protect IRA investors' current unrestricted access to free or low cost investment data, tools, research, education and support services. See, comments advanced by Mr. Christopher Gilkerson, Senior Vice President and General Counsel, Charles Schwab, in the filed comments dated July 20, 2015, at pp. 8-10 (Available at: <http://www.dol.gov/ebsa/pdf/1210-AB32-2-00571.pdf>) (Last Visited on September 15, 2015).

Finally, the Department should include exchanged-traded call and put options on the list of permitted

assets contained in the final rule. Here again, I concur with Mr. Gilkerson's recommendation as set forth in the a foregoing comments at Exhibit 1, id, at pp. 24-25. See also, comments of Mr. Craig S. Donohue, Executive Chairman, Options Clearing Corporation ("OCC") dated July 17, 2015, at pp. 2-3 (Available at: <http://www.dol.gov/ebsa/pdf/1210-AB32-2-00420.pdf>) (Last Visited on September 15, 2015).

Thank you, again, for the opportunity to comment.

A. Aballi